

ACQUISITION ADVISORY PANEL
Meeting Minutes
February 28, 2005
Department of Interior, Rachel Carson Room
Washington, D.C.

The Acquisition Advisory Panel (AAP) convened its second meeting at 9:10 A.M. on February 28, 2005 in the Rachel Carson Room at the Department of Interior, Washington D.C. Ms. Marcia Madsen, Chair of the Acquisition Advisory Panel, opened the meeting by introducing herself and thanking everyone for coming out on a snowy day.

Ms. Laura Auletta, the AAP's Designated Federal Officer (DFO) , called the roll. The following Panel members were present:

Mr. Louis Addeo
Mr. Frank J. Anderson, Jr.
Mr. Allan V. Burman
Mr. Carl DeMaio
Mr. Marshall J. Doke, Jr.
Mr. Jonathan Lewis Etherton
Ms. Deidre A. Lee
Mr. Thomas Luedtke
Ms. Marcia G. Madsen
Mr. James "Ty" A. Hughes, Jr.
Mr. Joshua I. Schwartz
Mr. Roger Waldron

The following Panel members were not in attendance:

David A. Drabkin
Melanie Sablehaus

The DFO introduced Ms. Bethany A. Noble, sworn in as a Special Government Employee at the first public meeting and said that this uncompensated position of "Private Sector Coordinator" has been established to facilitate on procedural issues. Members of the public are always welcome to go directly to the DFO or the Panel Chair but Ms. Noble is also available to assist on procedural matters. Ms. Noble's contact information will be available at the Panel's website.

The DFO stated that an AAP website was in development and expected to be operational by the end of the week. The AAP site will be accessible from AcqNet and OMB organizational sites and the address will be www.acqnet.gov/aap.

The Chair briefly described how the public meetings will function. Meetings are open to the public. Public written comments are welcome, but not oral comments from the floor at this time. The Panel expects to schedule at least two sessions over the course of the year where oral comments will be solicited.

The Chair reviewed the AAP mission stating there are tasks that must be accomplished and those she hopes will be accomplished. Timing and available resources are important considerations. She stated that the authority of the AAP is from Section 1423 of the Services Acquisition Reform Act (SARA) of 2003. The AAP charter is very broad and includes a review of regulations and laws regarding the use of commercial practices, performance-based contracting, and performance of agency functions across agency lines of responsibility. The Panel is charged to review all Federal acquisition laws and regulations and, to the extent practicable, Government wide acquisition policies, with a view toward ensuring the effective and appropriate use of performance-based contracting and commercial practices as well as making recommendations for the modification of such laws, regulations, and policies considered necessary to protect the best interests of the Government, to ensure continuing financial and ethical integrity of acquisitions of the Government and to amend or eliminate provisions in such laws, regulations and policies as are necessary for effective, efficient, and fair award and administration of contracts. The Chair noted that the Section 800 Panel which reviewed acquisition issues more than a decade ago, and only looked at Defense laws, had a larger staff, a 2-year time frame in which to develop its recommendations, and funding. The SARA AAP has a much smaller staff, a 1-year time horizon and no appropriated funding. Therefore, there is going to be a lot of work for the individual members of the Panel and for its staff. Ms. Madsen introduced the AAP staff, Ms. Pamela Gouldsberry and Ms. Anne Terry. Ms. Pamela Gale was absent. The Chair then noted that the Panel would have to focus its efforts and potentially there is no end to the things that it could look at and discuss.

The Chair briefly discussed the schedule (Attachment 1) for upcoming monthly meetings and requested that Panel members provide her with feedback on their availability for the proposed August 18th meeting. She has received feedback from all Panel members on the prior monthly meetings. The Chair also stated that the Panel may hold one or two meetings out of town in the May/June time frame so it could hear from commercial entities in other parts of the country.

The Chair stated that due to limitations on time and resources, the Panel must focus on key issues. She made preliminary assignments of Panel members to five Working Groups: Commercial Practices/Commercial Items; Performance-Based Contracting; Government wide Contract and Interagency Contract Vehicles; Cross-Cutting Issues – Small Business; Cross-Cutting Issues – Federal Workforce. See Attachment 2 for membership and chair/co-chair assignments.

Handouts outlining the initial cut of issues for four (4) of the five (5) Working Groups were provided to the Panel members and public attendees (Attachments 3 - 6). Panel Member Mr. Jon Etherton asked whether the Chair saw a potential for cascading issues to fall out of the Working Groups, such as ethics and compliance issues. Panel Member Mr. Carl DeMaio also noted that ethics and

oversight might be a large issue. The Chair said she anticipated that the Panel would definitely get to those issues. She said that the Working Groups' initial cut of issues was to serve as a seed for future discussions. She agreed that other cascading issues will be developed and changes will occur in the future; groups and issues will likely be added and/or deleted. The Chair stated that Panel members should not view these as life-time assignments.

The Chair stated that the Working Groups are required to report-out at the next AAP Panel meeting scheduled on March 30th. The extent of the groups' review should be - "we looked at the issue(s), we identified components and here are recommendations for further review;" or, "we looked and do not consider the area worthy of pursuing." In response to questions from Panel members Mr. Ty Hughes and Mr. Carl DeMaio, the Chair elaborated on what form the products of the Working Groups should take. She stated that the report-out does not need to be scholarly or long, but it should form the basis of how to proceed. The report might include a recommendation to proceed/how to proceed, additional issues that should be considered, add X/delete Y, or for areas which are narrowly focused, completed recommendations. The Chair also stated that as additional issues are identified, the Working Groups should keep the Chair and other Panel members informed via e-mail.

The Chair also discussed the need for a report template and necessary components for a report. She stated the report should include an introduction, applicable laws and regulations, recommendations and an explanation or justification of why a change is recommended. In response to a comment from Panel member Dr. Allan Burman, the Chair stated that she does not believe there is a need to develop an exhaustive list of all laws and regulations relating to services contracting. Ms. Madsen will develop a draft report format.

Panel member Ms. Deidre Lee asked how the Federal Advisory Committee Act impacts the operations of the Working Groups. The DFO stated that the Working Groups do not need to be public if the Working Groups report back to the full Panel during public meetings.

The AAP Chair reviewed four "Initial Working Group Issues" handouts she had developed, one associated with each of the Working Groups except Small Business. (See Attachments 3 - 6)

The Chair notified the Panel that presentations will be made by both commercial entities and Government groups on topics of interest relating to best practices. She hopes to have invitations to commercial entity potential presenters for the March and April meetings sent by the end of the week. She envisions that representatives from the Government will be invited to present their perspective on some of the issues in the June/July time-frame. The Chair invited other Panel members to submit suggestions for possible presenters. Panel members Mr. Carl DeMaio, Dr. Allan Burman, Mr. Frank Anderson, and Mr. Louis Addeo

commented on aspects of targeting presenters early and often so that commercial and Government best practices could be considered by the Working Groups.

The Chair discussed the process and the timing of the Working Group reports for the March 30, 2005 Panel meeting. The Chair indicated that the individual reports should be circulated to the Panel members, DFO and Chair 3-4 days before the scheduled meeting. Ms. Madsen reiterated that she will circulate a format for the report.

The Chair stated that the AAP staff had begun compiling research materials and that some material would be made available electronically. Mr. Carl DeMaio recommended that the Panel maintain running wish lists of reference materials. The Chair recommended that as the Working Groups begin, each Group should compile and maintain a list of their reference materials. There was discussion of making available to interested Panel members copies of both the Section 800 Panel Report and a compilation of acquisition laws. Panel member Professor Joshua Schwartz noted that he can arrange access to the George Washington University library for AAP members and staff.

Panel member Mr. Jonathan Etherton recommended that the Panel be very clear with its recommendations so that any legislation written accurately reflects the AAP's intent. The Chair stated that she believes it is too early to talk specifically about language and format of recommendations, but that Panel members should keep in mind the users of the recommendations as they are working in their groups.

The Chair stated that several weeks ago, she requested the DFO and staff compile data on Governmentwide Acquisition Contracts (GWACs), Schedules, Multi-Agency Contracts, and Blanket Purchase Agreements (BPAs). The DFO stated that the data collected by Federal Procurement Data System (FPDS) does not capture all the information that might be useful. For 2003, FPDS data shows that eleven (11%) of information technology procured under GWACs used a performance-based acquisition approach. Information that is not currently available, however, includes whether a schedule order was based on best value or low price. The Chair stated that a conceivable AAP recommendation might be to add data fields to FPDS. In response to a question from AAP member Mr. Carl DeMaio on whether the Government has met the President's Management Agenda mandate to have 50% of contracts be performance-based, the DFO stated that FPDS is working on a Government wide report that should be available soon. The Chair recommended that each Working Group maintain a list of data that members wished they had access to.

The Chair provided each Panel member the opportunity to make comments on the Panel's potential goals and its scope. Panel member Mr. Tom Luedtke recommended that while the report may include broad recommendations, the

number should be kept to a minimum and the Panel's focus should be on developing crisp and usable recommendations that can be acted upon to make significant improvements. He stated that the acquisition community will be better served if the Panel identifies top items and does not try to develop a long list of nuanced recommendations that causes people to lose focus and become frustrated.

Panel member Dr. Allan Burman agreed with Mr. Etherton and Mr. Luedtke that it is important to have clear recommendations, but that based on his experience working on the Section 800 Panel where members sometimes spent too much time determining the exact verbiage of the report, the AAP Panel members should take a balanced approach and that the Panel should not be a rule-writing group.

Panel member Mr. Carl DeMaio talked about striking a balance between addressing ethics and oversight and the potential for going overboard with internal controls, and in doing so, not making the Government a smart shopper anymore. The Chair responded that balance is a fair question for the Working Groups to consider.

Panel members Mr. Frank Anderson and Professor Joshua Schwartz discussed the AAP's role in addressing ethics. They believe that mistakes in judgment will always be made and that the AAP should not take a reactive posture in response to recent high profile lapses in judgment by Government officials. Additionally, Professor Schwartz noted he was particularly pleased that a cross-cutting Working Group had been established to determine what is being demanded of the workforce and examine what needs to be done to build a workforce to meet reasonable program implementation expectations.

Panel member Mr. Marshall Doke stated that commercial practices vary; there is not a consistent set of commercial practices. He recommended that a focus of the AAP should be to reduce obstacles for companies to do business with the Federal Government. Mr. Doke encouraged the Panel members to "do a lot of listening," especially to companies who choose not to do business with the Government. Some of the Panel's recommendations may flow from the companies' answers. Mr. Doke also noted that there has been a lot of recent internet traffic regarding contracting out of inherently Government functions and what constitutes an inherently governmental function. Panel Member Ty Hughes asked if there is a move to contract more functions to contractors, should a different standard of employee conduct be developed?

Panel member Mr. Frank Anderson recommended that the AAP develop a draft milestone schedule for development of the AAP final report. The Chair suggested that she believes that by the end of September, the Panel should be in the initial stages of writing the report. She will flush out a schedule and circulate for the next meeting on March 30th.

ADJOURNMENT

The DFO adjourned the meeting at 10:50 A.M.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.

A handwritten signature in black ink, appearing to read "Marcia Madsen", followed by a long horizontal flourish.

Ms. Marcia Madsen
Chair
Acquisition Advisory Panel

Proposed Potential Meeting Schedule
SARA Acquisition Advisory Panel

1. Monday February 28, 2005-- 9:00 a.m. to 1:00 p.m.
2. Wednesday March 30, 2005 – 9:00 a.m. to 5:00 p.m. Portion set aside for a hearing.
3. Tuesday April 19, 2005 – 9:00 a.m. to 5:00 p.m. Portion set aside for a hearing.
4. Tuesday May 17, 2005 – 9:00 a.m. to 5:00 p.m. Portion set aside for a hearing.
5. Tuesday June 14, 2005 – 9:00 a.m. to 5:00 p.m. Portion set aside for a hearing.
6. Tuesday July 12, 2005 – 9:00 a.m. to 5:00 p.m. Portion set aside for public comment.
7. August meeting????? Maybe August 18, 2005.

Acquisition Advisory Panel
Initial Working Groups
February 28, 2005

(As Revised by Panel Chair at Subject Meeting)

Commercial Practices/Commercial Items

Ty Hughes (Co-Chair)
David Drabkin (Co-Chair)
Marshall Doke
Roger Waldron

Performance-based Contracting

Allan Burman (Co-Chair)
Carl DeMaio (Co-Chair)
Louis Addeo
Joshua Schwartz

Government-wide Contracts and Interagency Contract Vehicles

Frank Anderson (Co-Chair)
Jonathan Etherton (Co-Chair)
Deidre Lee
Thomas Luedtke
Melanie Sabelhaus

Cross-cutting Issues – Small Business

Melanie Sabelhaus (Chair)
Deidre Lee
Louis Addeo
Roger Waldron

Cross-cutting Issues – Federal Workforce

Joshua Schwartz
David Drabkin
Frank Anderson
Carl DeMaio
Allan Burman

Notes: (1) The Panel Chairperson, Marcia Madsen, may participate in any or all groups.
(2) Roger Waldron will be a resource for Federal Supply Schedule issues

Acquisition Advisory Panel

Initial Working Group Issues

February 28, 2005

Commercial Practices/Commercial Items Working Group

1. Does the definition of “commercial item” at FAR 2.101 need to be clarified?

For example:

- What is the definition of a minor modification? If an item is commercially produced, but modified for use in a government mission – is the item still “commercial?”
- What is the definition of an item customarily used by the “general public” or by “non-governmental” entities for purposes “other than governmental purposes?” Does that include items used by the general public, but sold to state and local entities? Does it include items sold to governmental entities acting in a proprietary manner? Does it include items sold to corporations that are partially or wholly state funded?

2. Who is responsible for determining whether an item offered under a subcontract is a commercial item? Once made, should that decision be second-guessed? Does the provision at DFARS 244.402, which provides that prime contractors “shall” determine whether a subcontract item is commercial, but reserves the right for the CO to make a different judgment pursuant to FAR 15.403-1(c)(3), need to be revised?

- What impact does the DFARS provision have on prime contractors’ willingness to use commercial item authority?
- Where prime contractors are designating subcontract items as “commercial,” what terms are included in the subcontracts regarding provision of cost and pricing data?

3. Section 1443 of the National Defense Authorization Act for 2004 amended the OFPP Act to add special emergency procurement authority for use by any executive agency for defense against or recovery from nuclear, chemical, biological or radiological attack against the United States. This authority allows the head of an agency to deem a procurement for these purposes as a “commercial item” (subject to certain restrictions on sole source awards).

Is it appropriate to “deem” items or services as “commercial” that do not otherwise qualify? If an exemption from CAS or TINA requirements is necessary, why not just authorize the exemption?

4. Potential issues for a presentation by commercial entities at the March and April Panel meetings:

- **What is commercial practice regarding head-to-head competition for services contracts and task orders, including IT services and business process type services?**
- **What is commercial practice regarding use of firm-fixed price contracts or task orders for services contracts?**
- **What is commercial practice for use of time and materials or labor hours contracts?**
- **What is commercial practice regarding share-in-savings contracts?**
- **Do commercial companies use best value procurement? How do they determine best value?**
- **What processes/techniques do commercial companies use to establish requirements for services procurements?**

Acquisition Advisory Panel

Initial Working Group Issues

February 28, 2005

Performance-based Contracting

1. The "Seven Steps" emphasize the significance of the Performance Work Statement ("PWS"). A PWS is described as requiring "measurable performance standards." Is it possible for agencies to establish definitive requirements in specific and measurable terms at the beginning of the contracting process?

-- Is upfront identification of the bases upon which measurement of performance will occur essential to Government use of performance-based contracting?

-- Does the use of "statements of objectives" to which the contractors then develop and bid on their own statements of work result in quantifiable benefits that are consistent with the philosophy of performance-based service acquisition ("PBSA")?

2. How should "best value" be determined for PBSA – how will differing approaches be compared in selecting a contractor?

3. To what extent are contracts considered to be PBSA also fixed-price?

4. Once the contract has been awarded, what metrics are agencies using to assess the benefits of PBSA, e.g., lower prices, improved contractor performance?

-- How are those benefits being documented?

5. How is "past performance" determined for PBSA contracts when the SOW, performance metrics, and quality assurance plan have largely been developed by the contractor?

-- Will past performance in the end simply reflect whether the agency was satisfied with the overall outcome?

6. With respect to data – is it possible to track the extent to which PBSA contracts overrun their originally negotiated prices?

7. What tools can contractors use to manage PBSA contracts if Government officials treat these arrangements like cost-reimbursement contracts and intrude into the contractor's performance?

8. Potential Issues for presentation by commercial entities at the March and April Panel meetings:

- Do commercial entities using performance-based contracts require measurable performance standards at the outset of contracting?

- **What post-award techniques do commercial entities use to measure success of performance-based contracts?**
- **What remedies do commercial entities use if performance does not meet expectations?**

Acquisition Advisory Panel

Initial Working Group Issues

February 28, 2005

Government-wide Contracts and Interagency Contract Vehicles

1. Are government-wide contracts and other interagency contract vehicles sufficiently open to head-to-head competition to allow participation of new competitors and access to new technology and services?

-- what data exist regarding the use of competition and how it affects awards of these contracts?

2. Are task orders awarded with sufficient use of competition? Should task orders be awarded using head-to-head competition?

-- what data exist regarding use of competition on task orders and how it affects awards?

3. Do smaller companies and small businesses receive the maximum opportunity to compete under these contracts?

4. Is the use of the Federal Supply Schedule for major procurements of services (e.g., procurements over \$100 million) appropriate? What is the legal basis for using the FSS for such major procurements?

-- Does the use of the FSS for major procurements reflect an appropriate allocation of risk?

5. Do task orders use the firmest appropriate pricing arrangement possible (e.g., fixed-price?)

6. How should the overall benefits and drawbacks of these instruments be evaluated and compared? Does data exist to make such comparisons?

-- Is it possible to determine whether actual competition would produce a better value for the taxpayer?

7. Who is responsible for administration and monitoring of these contracts and orders placed under these contracts, e.g., is it the agency holding the contract or the user?

-- What mechanisms exist to enforce the contract terms if the user does not properly administer the order?

8. Do sponsoring agencies have a conflict-of-interest between marketing to increase their business and protecting the taxpayer by using optimal contracting methods?

9. Potential issues for presentation by commercial entities at the March and April Panel meetings:

- Do commercial entities use similar contract vehicles, i.e., do commercial entities order new requirements from schedules or do they conduct actual competitions?
- What pricing arrangements are used by commercial entities for task orders under existing contracts?
- Do commercial entities use cost reimbursement, time and materials, or labor hour arrangements for task orders. If so, under what conditions and limitations?
- What limitations do commercial entities impose on use of task orders without going back to the marketplace for a new competition?
- What types of terms do commercial entities use in task order contracts?

Acquisition Advisory Panel

Initial Working Group Issues

February 28, 2005

Acquisition Workforce

1. Assessment of the complexity of the work for commercial practices and performance-based contracting – is the effort too complex?

--Examine the judgments and decisions involved in these acquisitions.

2. How should agencies institutionalize human capital strategic planning to identify acquisition workforce short and long-term personnel and training needs?

3. Is the current management structure inside the Government appropriate for commercial practices and performance-based contracting?

-- Should the “program” (requirements) organization and the acquisition organization be more closely linked?

-- Is the contracting organization placed at the right level in the agencies?

4. Potential issues for presentation by commercial entities at the March and April Panel meetings:

- How do commercial entities structure their buying organizations?**
- How do the requirements setting and contracting organizations relate?**
- What level is the buying organization in the company?**
- What types of internal controls are required by commercial entities?**